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October 21, 2009

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Hearing Officer's Decision*

Name of Case: Personnel Security Hearing

Date of Filing: June 30, 2009

Case Number: TSO-0780

This Decision concerns the eligibility of XXXXXXXXXXXX (the Individual) to retain his access authorization.<sup>1/</sup> The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual is eligible for access authorization.<sup>2/</sup> After reviewing the evidence before me, I find that the Individual's suspended access authorization should be restored.

***I. Background***

This administrative review proceeding began when a Department of Energy (DOE) Local Security Office (LSO) suspended the Individual's access authorization based upon derogatory information in its possession that created substantial doubt pertaining to his eligibility. In accordance with 10 C.F.R. § 710.21, the LSO subsequently issued a Notification Letter that included a statement of the derogatory information causing the security concern. The Notification Letter cited security concerns related to § 710.8(h) and (j) (Criteria H and J).

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<sup>1/</sup> Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

<sup>2/</sup> Access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5(a).

The derogatory information supporting the Criteria H and J<sup>3/</sup> concerns states that the Individual was diagnosed by a DOE consulting psychiatrist as suffering from alcohol abuse, which causes or may cause a significant defect in his judgment. Notification Letter dated March 12, 2009, Enclosure 1 at 1. In addition, the Individual was charged with Driving While Intoxicated on February 1, 2008. Notification Letter, Enclosure 1 at 1. Finally, he admitted to the DOE consultant psychiatrist that his second ex-wife complained about his alcohol usage and that it affected their marriage. Notification Letter, Enclosure 1 at 1.

The Notification Letter informed the Individual that he was entitled to a hearing before a Hearing Officer, in order to respond to the information contained in that letter. Upon receipt of the Notification Letter, the Individual requested a hearing, and that request was forwarded to the Office of Hearings and Appeals (OHA). The OHA Director appointed me the Hearing Officer in this matter, and I conducted a hearing in this case in accordance with 10 C.F.R. § 710.25(e) and (g).

At the hearing, the Individual represented himself, testifying on his own behalf, and presenting the testimony of a friend and three co-workers. The DOE Counsel presented the testimony of the DOE consultant psychiatrist. The DOE entered 24 exhibits into the record; the Individual entered two exhibits into the record.

## ***II. The Hearing Testimony***

### ***A. The Individual***

The Individual testified that his arrest for Driving While Intoxicated (DWI) was devastating. Hearing Transcript (Tr.) at 130. He testified that he does not believe he has an alcohol consumption problem, but that he used bad judgment on the night of his DWI. Tr. at 140. The events leading up to his DWI were unusual. Tr. at 130. He testified that he had just “broken up with” his girlfriend. Tr. at 133. He stated that emotionally it was the most difficult breakup he had sustained. Tr. at 133. In addition, his mother informed him that she had been diagnosed with a terminal form of cancer. Tr. at 133. He testified that he was distraught, but wanted to be with friends. Tr. at 134. He believed that he had stopped consuming alcohol before he became intoxicated. Tr. at 134.

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<sup>3/</sup> Criterion H refers to information indicating that an individual has “an illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability.” 10 C.F.R. § 710.8(h). Criterion J refers to information indicating that an individual has “[b]een, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse.” *Id.* at § 710.8(j).

The Individual testified that he last consumed alcohol three days prior to the hearing. Tr. at 130. He presently has approximately four beers in his refrigerator that he purchased a couple of weeks before the hearing. Tr. at 131-32. The week prior to the hearing, he consumed a half a glass of wine and conversed for two hours prior to driving. Tr. at 132. That was the last time he consumed alcohol within four hours of driving home. Tr. at 132. Prior to his interview with the DOE consultant psychiatrist, the Individual had not consumed any alcohol since his DWI, except perhaps one beer with a meal. Tr. at 159-60. He consumed alcohol about one month after the interview with the DOE consultant psychiatrist for the first time since his DWI. Tr. at 130, 147.

The Individual testified that he does not have a problem with alcohol consumption. Tr. at 167. He testified that he has never passed out from consuming too much alcohol. Tr. at 177. He has never had a loss of memory from consuming too much alcohol. Tr. at 177. He testified that, in his opinion, he does not get intoxicated. Tr. at 182. He was not ordered to attend Alcoholics Anonymous by the court as a result of his DWI. Tr. at 187. The Individual testified that there was no evidence of alcohol abuse in his personnel file except for the DWI. Tr. at 192.

#### B. The Individual's Co-Workers

The Individual's first co-worker is also his supervisor. Tr. at 11. He testified that he has known the Individual for seven to eight years. Tr. at 11. They started as co-workers. Tr. at 11. They have socialized together at conferences or while on travel. Tr. at 15. He has never seen the Individual intoxicated. Tr. at 15. He has never found that alcohol affected the Individual's job performance, which is good. Tr. at 15. The co-worker testified that he has never seen the Individual demonstrate a pattern of work absences that might be attributed to alcohol consumption. Tr. at 33. He has never noticed symptoms of excessive alcohol consumption in the Individual. Tr. at 35-36. He has seen the Individual consume alcohol five times in the past. Tr. at 23. He thinks the most he has ever seen him consume is two drinks. Tr. at 24.

The Individual immediately reported his DWI arrest to the first co-worker. Tr. at 22. He took responsibility for the arrest. Tr. at 22. The first co-worker was not shocked by the DWI, but he was not expecting any such problem from the Individual. Tr. at 22-23. He stated that humans can make mistakes and that was why he was not shocked. Tr. at 23.

The second co-worker stated that he has worked with the Individual for seven to eight years. Tr. at 46. He has never doubted his trustworthiness. Tr. at 46. They have socialized together on travel. Tr. at 51. The second co-worker testified that he has only ever seen the Individual consume two drinks. Tr. at 53. He has never seen the Individual intoxicated. Tr. at 46.

The third co-worker testified that he has known the Individual for seven to eight years. Tr. at 63. The third co-worker testified that he has seen the Individual consume alcohol approximately ten times, including two or three times in the Individual's home while they were socializing together. Tr. at 68-69. He has never seen the Individual intoxicated or lose control. Tr. at 63. They work in an exceedingly sensitive area and no one has ever expressed concern over the Individual's alcohol consumption. Tr. at 85.

### C. The Individual's Friend

The friend testified that they have known each other for 10 years. Tr. at 87. He interviewed the Individual for a position at DOE. Tr. at 87. They have become good friends. Tr. at 88. They see each other at least once a week. Tr. at 88. The friend lives 100 yards from the Individual's first ex-wife. Tr. at 88. He knew both ex-wives. Tr. at 88. Neither ever complained in his presence about the Individual's alcohol consumption. Tr. at 88-89. He never saw the Individual lose control. Tr. at 90. He never saw him drive while under the influence of alcohol. Tr. at 90. He never saw the Individual abuse anyone or any thing. Tr. at 90. The last time they were together, one week prior to the hearing, the Individual consumed two half glasses of wine. Tr. at 90. When he and the Individual get together, the Individual does not always consume alcohol when the friend does. Tr. at 91. The friend knows the Individual's teenage children and they have never expressed concern about the Individual's alcohol consumption.<sup>4/</sup> Tr. at 91.

The Individual had a tempestuous relationship with his second ex-wife. Tr. at 92. It was a very bitter divorce. Tr. at 92-93. The Individual remains friendly with his first ex-wife. Tr. at 93. The Individual is a good father. Tr. at 109. He is trustworthy. Tr. at 109. His personal life has been turbulent the last 10 years. Tr. at 109.

Immediately prior to the Individual's DWI, the Individual was upset. Tr. at 94-95. He had just broken up with his girlfriend. Tr. at 95. His mother had just been diagnosed with cancer. Tr. at 95. The DWI did not surprise the friend. Tr. at 104. He was more concerned about the Individual. Tr. at 104. The Individual expressed a global remorse for the event on the night of the DWI. Tr. at 105.

The friend testified that he has seen the Individual intoxicated two times in the past seven years. Tr. at 111, 113. Seven years ago, he saw the Individual consume three to four glasses of wine at a party the Individual was hosting in his home for the Individual's ex-wife's birthday. Tr. at 112. Since then, he testified that he has seen the Individual intoxicated

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<sup>4/</sup> The friend testified that his son and the Individual's son are good friends who spend time at each other's homes. Tr. at 92. The Individual's son has never expressed a concern within the friend's hearing about the Individual's alcohol consumption. Tr. at 91.

once. Tr. at 113. The friend stated, “if intoxication means embarrassingly drunk, or I do not want him to be around my kids or my wife, I do not think I’ve ever seen [the Individual] like that.” Tr. at 113. The friend continued that the Individual’s alcohol consumption was decreasing, even prior to the DWI. Tr. at 110.

#### D. The DOE Consultant Psychiatrist

The DOE consultant psychiatrist testified that she diagnosed the Individual as presenting with alcohol abuse because he had been questioned about his alcohol use by the DOE two times prior to his DWI. The DWI caused him to lose his security clearance, which meant that he fulfilled the first criterion for alcohol abuse by failing to fulfill a major role obligation at work.<sup>5/</sup> Tr. at 220. She testified that he was not suffering from alcohol abuse at the time of the hearing, because he had not had an alcohol-related problem within the last twelve months. Tr. at 237-38.

As to whether there is adequate evidence of rehabilitation or reformation, the DOE consultant psychiatrist testified that the Individual has not had any rehabilitation, but there is adequate evidence of reformation. Tr. at 237, 238-39. She continued that he does not have to meet both rehabilitation and reformation. Tr. at 237. The DOE consultant psychiatrist stated that “he would be adequately reformed if he has not had any recurrence of the criteria within the last 12 months. So he would have adequately met reformation, but not rehabilitation.” Tr. at 237. She continued as to, “the reformation, I would have to say yes, because it has actually been more than a year that he had not had any adverse consequences of drinking, nor do I have any evidence that he had drank excessively . . . since February 1st, 2008.” Tr. at 238-39.

### *III. Standard of Review*

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of proceeding, the burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d).

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<sup>5/</sup> The DOE consultant psychiatrist based her diagnosis on the first criterion for substance abuse listed in *The Diagnostic and Statistical Manual of the American Psychiatric Association, IVth Edition Textual Revisions* (DSM-IV TR). That criterion states, “recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home.” *DSM-IV TR*, Criteria for Substance Abuse at A.(1).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See *Dep't of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of the national security test" for the granting of security clearances indicates that "security-clearance determinations should err, if they must, on the side of denials.") *Dorfman v. Brown*, 913 F.2d 1399, 1403 (9<sup>th</sup> Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate, or mitigate the allegations. *Personnel Security Hearings*, Case No. VSO-0005, *aff'd*, (1995). See 10 C.F.R. § 710.7(c). In the end, like all OHA Hearing Officers, I must exercise my common sense judgment in determining whether an individual's access authorization should be restored or granted after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c). Therefore I must consider whether the Individual has submitted sufficient evidence of mitigation to resolve the security concerns raised by his alcohol use.

#### *IV. Findings and Conclusions*

##### *A. Criterion J*

The White House issued the Adjudicative Guidelines on December 29, 2005, and made them applicable to the entire federal government. The Adjudicative Guidelines list causes for concern and possible mitigation of those concerns in the process of granting and retaining an access authorization. The corollary to Criterion J of the Part 710 regulations is Guideline G of the Adjudicative Guidelines. In pertinent part, Guideline G states the following conditions which could raise a security concern, "alcohol-related incidents away from work, such as driving while under the influence" and "diagnosis by a duly qualified medical professional . . . of alcohol abuse or alcohol dependence." As support for this Criterion, the LSO relied on the DOE consultant psychiatrist's diagnosis, the Individual's DWI arrest, and the Individual's admission that his second ex-wife complained about his alcohol use during their marriage. DOE Ex. 1 at 1.

In regard to the Individual's DWI arrest, the incident occurred more than 18 months prior to the hearing. The Individual and his friend testified that the DWI came at a difficult time in the Individual's life. He had just broken up with his girlfriend. He testified it was the hardest breakup of his life. And his mother had just been diagnosed with a terminal illness. The Individual testified that he thought he had ceased consuming alcohol prior to becoming intoxicated. The record shows that the Individual's Blood Alcohol Level was .09 percent, only .01 percent above the legal limit. The Adjudicative Guidelines state as a condition that could mitigate security concerns raised under Guideline G as "so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." Adjudicative Guidelines, Guideline G at

¶ 23(a). I find that the concern raised by the Individual's DWI incident is mitigated by both the infrequency of the behavior and the unusual circumstances under which it occurred.

The second element of support for the Criterion J security concern regards the Individual's statement during the PSI that his second ex-wife complained about his alcohol consumption. The friend testified that neither of the Individual's wives expressed concern to him about the Individual's alcohol consumption. The Individual's friend testified that he has seen the Individual intoxicated on only two occasions within their ten-year friendship. He testified that both these occasions were at the Individual's home. The Individual's children have not expressed concern to the friend about their father's alcohol consumption. I am not persuaded that the Individual's second ex-wife expressing concern over the Individual's alcohol consumption casts doubt on his current reliability, trustworthiness, or good judgment. There is sufficient witness testimony that indicates he is responsible in his alcohol consumption to diminish the weight that should be accorded the second ex-wife's accusations. Since the second ex-wife did not testify, I have no means to assess the severity or credibility of these reported accusations. Therefore, I find the Individual has mitigated the concern raised by the second ex-wife's complaints regarding the Individual's alcohol consumption.

Finally, the Criterion J security concern was raised because of the DOE consultant psychiatrist's diagnosis that the Individual was presenting with alcohol abuse. In a case which relies on the opinion of a mental health expert, we often give deference to that opinion. See *Personnel Security Hearing*, Case No. TSO-0233, (August 31, 2005); *Personnel Security Hearing*, Case No. VSO-0146, (July 31, 1997) (*aff'd*, by OSA 1997); *Personnel Security Hearing*, Case No. VSO-0027, (August 14, 1995); *Personnel Security Hearing*, Case No. VSO-0015, (June 5, 1995). The DOE consultant psychiatrist testified that she relied on the first criterion of the DSM-IV TR for substance abuse to find the Individual is suffering from alcohol abuse. That criterion states, "recurrent substance use resulting in a failure to fulfill major role obligations at work." Criteria for Substance Abuse outlined in the DSM-IV TR at A(1). She stated that the Individual's DWI, after assuring the DOE that he did not have a problem with alcohol consumption, was a failure to fulfill a major role obligation at work. She stated that his DWI caused him to lose his access authorization and, therefore, he could no longer fulfill his job obligations. I accept the DOE consultant psychiatrist's diagnosis that at the time she interviewed the Individual in September 2008, he was presenting with alcohol abuse.

However, at the hearing, after listening to the testimony of the Individual and his witnesses, the DOE consultant psychiatrist testified that the Individual is no longer suffering from alcohol abuse, because he had not had an alcohol-related incident within the preceding twelve months that resulted in his failure to fulfill a major role obligation at work. Further, she testified that because he had no recurrence of the DSM-IV TR alcohol abuse criteria within the last 12 months, he shows adequate evidence of reformation. He

has not had any adverse consequences of alcohol consumption for more than 12 months, nor does she have any evidence that he drank excessively since his DWI. Based on the foregoing, I find that the Individual has mitigated the security concerns raised under Criterion J of the Part 710 regulations in regard to the DOE consultant psychiatrist's diagnosis of alcohol abuse, his DWI arrest, and his second ex-wife's complaints regarding his alcohol consumption.

#### B. Criterion H

The Notification Letter raises a Criterion H security concern also related to the Individual's use of alcohol. As support for this Criterion, the LSO relied on the DOE consultant psychiatrist's opinion that, at the time of her evaluation, the Individual had a mental condition, alcohol abuse, that may cause a significant defect in his judgment or reliability. For the reasons discussed above in connection with my findings regarding Criterion J, I find that the Individual has also mitigated the security concern raised under Criterion H of the Part 710 regulations.

#### *V. Conclusion*

As the foregoing indicates, the Individual has resolved the security concerns cited in the Notification Letter under Criteria H and J. Therefore, I conclude that the Individual has shown that restoring his access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Consequently, it is my decision that the Individual's access authorization should be restored at this time. The parties may seek review of this decision by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Janet R. H. Fishman  
Hearing Officer  
Office of Hearings and Appeals

Date: October 21, 2009